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No. 88-39

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

JOE G. GARCIA, *et al.*,
Petitioners,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONERS

KALMAN D. RESNICK
67 East Madison Street
Chicago, Illinois 60603

GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037

LAURENCE GOLD
815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5390
(Counsel of Record)

Of Counsel:

EARLE PUTNAM
5025 Wisconsin Ave., N.W.
Washington, D.C. 20015

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

Introduction

The dominant theme of respondent SAMTA's brief in opposition is that this case is "unique" (Br. Opp. 1, 7, 12, 18).[1] But as we show in the Petition, and elaborate briefly in this Reply, the first and second questions presented raise important and recurring issues of non-retroactivity doctrine. The decision below is "unique" in only one material respect, to which the third question is addressed: It is the only case of which we are aware wherein, after this Court overruled a prior precedent, a lower court has determined that the overruling decision is to be applied only prospectively, *and* has nevertheless refused to apply the law stated in the overruled precedent to decide the merits of the case.

Defending this method of decision, SAMTA says that it would be "a strange irony for this Court to grant certiorari because a court of appeals failed to apply the very test which this Court has held is unworkable" (Br. Opp. 22-23); *viz.*, the "traditional government function" test of *National League of Cities* v. *Usery*, 426 U.S. 833. There is a "strange irony" in this case but not the one SAMTA posits. It is that petitioners, who prevailed in *Garcia I*, have not only been denied the benefits of the constitutional ruling in that case, but, because of the very breadth of their victory, have had their claims dismissed without a discussion on the legal theory on which this suit was brought; *viz.*, that public mass transit is not a "traditional government function." And it is both "ironic" and paradoxical that the court below has applied the reasoning of *Garcia I* retroactively *against* the prevailing party in that case, but the ultimate constitutional holding in favor of the prevailing party only prospectively.

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[1] Throughout this Reply, the Petition for Certiorari herein will be cited as "Pet." the Brief for Respondent in Opposition will be cited as "Br. Opp.".

I.

The court below squarely held (Pet. 10a), and respondent agrees (Br. Opp. 12), that "*all* questions of civil retroactivity continue to be governed by the standard enunciated in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97" (Br. Opp. 12, quoting *United States* v. *Johnson*, 457 U.S. 537, 563, respondent's emphasis). In the petition we challenge that holding and submit that *Johnson* is not intended to override the fundamental principle that "federal common law is 'subject to the paramount authority of Congress' ", *Milwaukee* v. *Illinois*, 451 U.S. 304, 313, quoting *New Jersey* v. *New York*, 283 U.S. 336, 348. Only this Court can resolve the tension between the broad and general language of *Johnson* (Pet. 14, n.13) and the holding of *Milwaukee* v. *Illinois* and the precedents there followed. The Court should do so now because the ruling below would overrule all Congressional judgments as to when a reliance defense should be allowed,[2] and because this Court has a special responsibility to preserve "an appropriate division of functions between the Congress and the federal judiciary". *Milwaukee* v. *Illinois*, 451 U.S. at 313.

SAMTA asserts that *Milwaukee* v. *Illinois* is inapposite on the ground that "section 10(a) of the Portal-to-Portal Act does not address the question of retroactive application of a Supreme Court decision that overruled past [judicial] precedent, and therefore section 10(a) clearly does not deal with the same subject to which *Chevron Oil* applies." Br. Opp. 11-12. See also *id.* 8-9

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[2] See, *e.g.*, the statutes cited at Pet. 14, and § 713(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-12(b). While we regret overlooking that provision (Br. Opp. 10-11), it does not affect our point that the court below erred in relying on this Court's decisions concerning retroactivity in the Title VII/pension context. Pet. 12-13. Those decisions were not based on, and did not mention, § 713(b); indeed, a study of the briefs in those cases shows that the provision was never called to the Court's attention.

(§ 10(a) "on its face" applies only to administrative rulings of the DOL Wage and Hour Administrator.) SAMTA reads *Milwaukee* v. *Illinois* much too narrowly. The Court there reasoned:

> Demanding specific regulations of general applicability before concluding that Congress has addressed the problem to the exclusion of federal common law asks the wrong question. The question is whether the field has been occupied, not whether it has been occupied in a particular manner. [451 U.S. at 324.]

And that preceednt teaches by example, *id.* at 317-324, that this question cannot be answered by looking only at the "face" of *one statutory provision*; all the pertinent legislative materials must be examined.

It is evident from even a brief examination of the legislative materials that the field which the Portal Act occupies (or, in SAMTA's terms, its "subject matter") is not confined to the effect of rulings of the Wage and Hour Administrator of the Department of Labor ("Administrator").

What became the Portal Act was Congress' response to *Anderson* v. *Mt. Clemons Pottery Co.*, 328 U.S. 680, and prior decisions which threatened employers (as well as contracting agencies under cost-plus contracts) with enormous unanticipated liabilities. Employer representatives did not limit their demand for corrective legislation to obtaining relief from the retroactive application of those decisions; the employers also sought protection against unexpected liabilities in the future. But supporters of the covered employees insisted, and the proponents of the bill agreed, that this defense should be narrowly circumscribed to avoid abuse.[3] Congress adjusted these concerns by

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[3] For example, Rep. Walter, one of the Managers of the bill in the House and a member of the Conference Committee, commented:

> The defense of good faith is intended to apply only where an employer innocently and to his detriment, followed the law as it was laid down to him by government agencies, without notice that such interpretations were claimed to be erroneous or in-

making nice distinctions in the statute—as is shown by comparing § 10(a) with §§ 9 and 11, provisions which SAMTA simply disregards.

Section 10(a) provides an employer with a defense to liability for activities engaged in *after* the enactment of the Portal Act only "if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation * * * of the agency of the United States specified" in § 10(b)—as to FLSA, the Administrator. Section 9, which provides a defense for acts *prior to* that statute's enactment, provides that such reliance could be based on "*any* administrative regulation * * * of *any* agency of the United States" (emphasis added).

The contrast between § 10 and § 11 is even more striking. Section 11 gives the courts discretion to eliminate or reduce liquidated damages "if the employer shows to the satisfaction of the court that the act of omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended." Such "reasonable grounds for believing" that the employer's action is not unlawful could be based on the decisions of any agency (such as a contracting officer) or a court.

Plainly, therefore, the Portal Act's scope of application is considerably broader than SAMTA would have it. And, given the judgments Congress made, it is of the essence here that allowing a defense from liability for a violation of the FLSA (governed by § 10a) to be based solely on an employer's showing that his action was in a good-faith belief, and that he had reasonable grounds for believing, that his action is lawful (the lesser showing by which § 11 affords discretionary relief from liquidated dam-

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valid. It is not intended that this defense shall apply where an employer had knowledge of conflicting rules and chose to act in accordance with the one most favorable to him. [93 Cong. Rec. 4390 (1947)].

ages)—which is precisely what the court below allowed—is wholly inconsistent with the Portal Act.[4]

II.

It is paradoxical for SAMTA to assert that the "insubstantiality of the petition is underscored by the fact that" the Petition urges that the court below erred with respect to each of the *Chevron* factors. (Br. Opp. 12).[5] An abundance of errors, each of which is of independent significance, should render a lower court decision more rather than less vulnerable to review.

A. We begin by noting that the errors of the court below take on added seriousness when viewed in combination because that court's analysis of *Chevron*'s first and second factors are mutually contradictory. The centerpiece of the reasoning below with respect to the first *Chevron* factor is that *Garcia I* makes it impossible for

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[4] SAMTA seizes on the 1985 amendments to the FLSA for an additional argument that § 10 of the Portal Act is inapplicable. Those amendments relieve public agencies of liability for violations of §§ 6, 7 or 11 of the FLSA occurring before April 15, 1986 except with respect to any employee who may have been covered by the FLSA under the Secretary of Labor's special enforcement policy on January 1, 1985, published in 29 C.F.R. § 775.3. As explained in the Committee Report cited by SAMTA, "*[t]he amendments are intended to protect the rights of both sides to resolve their differences through litigation, without taking a position on the matter.*" Br. Opp. 9-10, SAMTA's emphasis. From this, SAMTA argues: "If Congress intended for section 10(a) to control the retroactivity question, it would not have intentionally reserved resolution of that issue for the courts." *Id.* 10. This is a *non sequitur*. By leaving the matter to the courts, Congress undoubtedly intended that the courts would apply the entire corpus of the law, including any statutes which might bear on liability. In contrast a partial repeal of the Portal Act for purposes of this litigation would obviously be "taking a position on the matter".

[5] We believe, in agreement with Judge Friendly, that a decision must be applied retroactively unless the party who urges otherwise satisfies the first *Chevron* factor. *Kremer* v. *Chemical Construction Co.*, 623 F.2d 786, 789 (C.A. 2), cert. denied on this issue, 452 U.S. 960, affirmed on another issue, 456 U.S. 461.

the Courts to determine whether public mass transit is a traditional state function or a nontraditional one "because the Supreme Court has explained that the *National League of Cities* doctrine was 'unsound in principle and unworkable in practice'." Pet. 15a, quoting 469 U.S. at 546. But the court below then wholly disregards that portion of *Garcia I*'s holding in reaching the conclusion that the second *Chevron* factor is neutral. See Pet. 19. SAMTA makes no attempt to resolve this inconsistency.

B. SAMTA's responses concerning the separate *Chevron* factors warrant only brief reply.

(1) We agree that since this Court did not, in *National League of Cities* v. *Usery*, 426 U.S. 833, attempt to identify all traditional activities, "it must have intended for responsible public entities, * * * to use *National League* as the framework for determining if they were performing a traditional function." Br. Opp. 13-14. But, of course, *National League* did *not* hold, or so much as suggest, that public entities would be free from liability, if they chose not to comply with the FLSA's wages and hours requirements, and it were subsequently determined that the activity was not "traditional". While *National League* "was a 'hard fact[] on which [SAMTA had to] rely in making decisions and in shaping [its] conduct' " (Br. Opp. 14, quoting *Lemon* v. *Kurtzman*, 411 U.S. 192, 199), the "hard fact" was that *National League* did *not* immunize all public agency functions and, therefore, could *not* safely be relied on by SAMTA as long as the status of mass transit was in question.

On remand from this Court in the *National League* case, the district court addressed this problem directly; that court entered a decree which, with the cooperation of the Labor Department, provided a "safe harbor" for public agencies, unless and until they were advised that DOL considered a function to be nontraditional. This litigation arose because SAMTA thereupon chose to test the waters by continuing its noncompliance with the FLSA (at the expense of its employees) and adhered to

that choice even after the original remand in *Garcia I*, and the decisions of three Circuits that mass transit is not a traditional governmental activity gave further warning that the waters were hazardous.

The facts just stated materially differentiate the decision below from those in *Mineo* v. *Port Authority of New York & New Jersey*, 779 F.2d 939 (C.A. 3), and *Ackinclose* v. *Palm Beach County, Fla.*, 845 F.2d 931 (C.A. 11), cited at Br. Opp. 14. The *Mineo* Court, in contrast to the court below, emphasized that *Chevron* requires actual "reasonable" reliance on "prior law." 779 F.2d at 944-945. That court then concluded that it was reasonable in that case for the Port Authority to regard its detectives as being "engaged in the activity of police protection," even though the Authority "includes mass transit among its many activities." *Id.* There was, of course, no contrary determination by any agency or court.[6]

Because of the facts before it, the Third Circuit reached the result that *Garcia I* should not be applied retroactively in favor of the plaintiff Detectives; accordingly, we have not argued that there is a conflict of decisions between the Third and Fifth Circuits on the *Chevron* issue. But the *Mineo* court's general approach to the retroactivity issue is totally at odds with that of the Fifth Circuit herein:

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[6] The same is true of *Ackinclose*, which involved a public water utility department. *Austin* v. *City of Brisbee*, 57 U.S. L.Wk. 2156 (C.A. 9, Aug. 29, 1988), cited at Br. Opp. 7, n.4, involves a city's police officers and clearly satisfies the first *Chevron* factor for nonretroactivity.

SAMTA can take no comfort from the passage from *Mineo*, quoted at Br. Opp. 14, which it is said, "captured the essence of [SAMTA's] point". There, in discussing the third *Chevron* factor, the court "agree[d]" that the Port Authority's decision was "based on an accurate assessment of the law at the time [its] decision was made." As is clear from an earlier sentence in the same paragraph from which SAMTA quotes, the Third Circuit's view in that respect was based on its determination *at the next step of its opinion* that the Authority was entitled to prevail under the *National League* test. In this case, however, the Fifth Circuit made no such determination.

> * * * A recent decision is generally applied even to a dispute that arose prior to the court's holding. * * * However, at times application of this retroactivity precept produces inequitable results, penalizing parties who ordered their affairs in reasonable reliance on a rule of law that was later invalidated. * * * Consequently, it has been held that courts in certain circumstances appropriately may determine not to apply a decision retroactively. [774 F.2d at 943.]

The decision below, in contrast, has so diluted the "reasonable reliance" as to virtually nullify the general "principle that courts will apply the law in effect at the time they decide a case." See Pet. 15, quoting *Goodman* v. *Lukens Steel Co.*, 107 S.Ct. 2617, 2621 (June 19, 1987).

(2) One rule of *Garcia I* "is that courts generally cannot review Congress' exercise of its commerce power against the states". Br. Opp. 16. SAMTA is surely wrong in arguing that this rule will "not be advanced by retroactivity here." *Id.* For, necessarily included in that "broad[]" statement of the rule of *Garcia I* is the holding that Congress acted *within its Commerce power* in applying the FLSA to the states. Properly understood, therefore, the rule of *Garcia I* can be effectuated only by so applying the FLSA *from its effective date*; this is especially clear, since making employees whole through the back-pay remedy of § 16(b) is a major element of Congressional policy under the FLSA. See Pet. 18 and *id.*, n. 15, which the brief in opposition disregards.

The foregoing proposition can be stated more generally as it pertains to the second *Chevron* factor: When this Court has held (as in *National League*) that an Act of Congress may not constitutionally be applied in certain circumstances, and thereafter overrules that holding and affirms the constitutionality of the statute, the rule of the later decision can be effectuated *only by* giving the second decision retroactive effect. The situation is in this respect fundamentally different from cases like *Lemon* v. *Kurtzman*, 411 U.S. 192 (Br. Opp. 14) and *Chicot County Dist.* v. *Bank*, 308 U.S. 371, which denied retro-

active effect to decisions holding a law to be *un*constitutional and parties had acted in reliance on, and in compliance with, that law.

(3) SAMTA, while saying that the "equities" factor depends on the facts of this case, disregards our showing that, on principle and precedent, the court below erred by relying on what it treats as a bargain between SAMTA and the union, again, contrary to Congressional policy. Pet. 21-22. Moreover, it is clear that the union did not "assume the nonapplicability of the FLSA" (Br. Opp. 18); the union was vigorously litigating the question during this entire period. Mr. Carr's affidavit on summary judgment (*id.*) is therefore beside the point, even accepting the Fifth Circuit's "bargain" theory.

III.

National League did not hold that state and local governments are constitutionally immune from the FLSA with respect to all of their functions; only "traditional governmental" functions were protected. Yet, under the decision below, petitioners' claims have been dismissed without a determination that public mass transit is a traditional governmental function. This result cannot be reconciled with either *National League* or *Garcia I*.

SAMTA asserts, however, that the Court of Appeals' error was "invited" by petitioners. Br. Opp. 19-20. That statement is demonstrably false. The sentences which SAMTA quotes from petitioners' opening brief in the court below appeared in a section entitled "EVEN ASSUMING THAT *CHEVRON* APPLIES AND REQUIRES THE APPLICATION OF PRE-*GARCIA* LAW, SAMTA'S EMPLOYEES ARE ENTITLED TO AN AWARD OF STATUTORY DAMAGES". Petitioners there argued, *inter alia*, that the District Court had erred in following its own twice-vacated decisions in *Garcia I*, although every Court of Appeals (the Third, Sixth and Eleventh Circuit) which addressed the issue prior to *Garcia I* had held that mass transit operations are nontraditional governmental functions subject to the FLSA. The sentences

which SAMTA quotes from the reply brief appear in a section entitled "SAMTA IS STATUTORILY LIABLE FOR ITS OVERTIME VIOLATIONS UNDER PRE-*GARCIA* LAW". Lest any doubts remain, these sections of the briefs are reproduced in full as an appendix hereto.

The Court of Appeals' action is so contrary to the rule of law and so distorts retroactivity doctrine that review is clearly warranted in the exercise of this Court's supervisory powers over the lower federal courts. However, the decision also conflicts with those of the Third Circuit in *Mineo*, and of the Eleventh Circuit in *Ackinclose*, since those courts *did*, after holding *Garcia I* to apply only prospectively, go on to decide the plaintiffs' claims under *National League*. Pet. 23-24. SAMTA's denial that a "direct" conflict exists is largely an extension of its baseless contention that the error was invited. Br Opp. 21.

In arguing that the conflict does not merit this Court's attention, SAMTA mischaracterizes the issue, which is not the "continued viability" of the "traditional function" test (Br. Opp. 22), but whether, if a court decides that the new rule may be applied only prospectively, it must adjudicate a case under the old rule. That issue can arise in future contexts, especially if—as was held below—reliance on an overruled "general framework" is sufficient to avoid retroactivity.

CONCLUSION

For the foregoing reasons and those stated in the Petition for a Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

KALMAN D. RESNICK
67 East Madison Street
Chicago, Illinois 60603

GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037

LAURENCE GOLD
815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5390
(Counsel of Record)

Of Counsel:

EARLE PUTNAM
5025 Wisconsin Ave., N.W.
Washington, D.C. 20015

APPENDIX

APPENDIX

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* * * *

IV. EVEN ASSUMING THAT *CHEVRON* APPLIES AND REQUIRES THE APPLICATION OF PRE-*GARCIA* LAW, SAMTA'S EMPLOYEES ARE ENTITLED TO AN AWARD OF STATUTORY DAMAGES

Even assuming that the district court correctly decided that *Chevron* applies and requires the application here of pre-*Garcia* law, the Court erred by concluded that its two prior rulings in the companion case, construing mass transit to be a "traditional governmental function," constitute the applicable pre-*Garcia* law (R. 8, 9). It would indeed be a strange principle of federal common law if a district court could use the *Chevron* doctrine to deny application of a Supreme Court decision and reapply to the same parties who had litigated the issues in a companion case a legal standard found unworkable and unacceptable by the Supreme Court. That is precisely the result of the district court's decision here. In effect, the district court overruled the *Garcia* decision for purposes of this case and applied its prior "consistent" rulings upholding SAMTA's defense to liability, even though the Supreme Court vacated and reversed each of those rulings.

Contrary to the district court's analysis, the law prior to *Garcia* mandated that SAMTA comply with the FLSA. It is unnecessary to rethink or reapply the "traditional governmental functions" test. First, the 1974 FLSA amendments state that mass transit must comply with the FLSA. 1974 FLSA Amendments, § 21. Second, § 10 of the Portal-to-Portal Act provides that employers must comply with the DOL regulations or be held liable to

their employees for damages. 29 U.S.C. § 259. *See supra* discussion at Section IIB. The DOL's post-*National League* regulations notified public employers of their statutory liability for FLSA violations occurring in functions defined by the Administrator as "non-traditional," 29 C.F.R. § 775.2, and, since 1979, the DOL has defined mass transit to be a non-traditional function: 29 C.F.R. § 775.3(b)(3). Third, every federal circuit court of appeals to address the issue prior to *Garcia* held that mass transit operations were nontraditional governmental functions obligated to comply with the FLSA. *Kramer*, 677 F.2d at 310; *Dove*, 701 F.2d at 53; *Alewine*, 699 F.2d at 1069. Thus, even applying the *Chevron* doctrine, SAMTA's employees are still entitled to relief because they were protected by the FLSA under the law prior to *Garcia*.

The decision in *Dove*, slip op. at 8-9 (R. 102-03), finding that mass transit under pre-*Garcia* law was *not* a "traditional governmental function," illustrates the illogical consequences of the district court's approach here. The district court in SAMTA and *Dove* cannot both be correct concerning the application of the "traditional governmental functions" test to mass transit. Would the Supreme Court be expected to resolve a split in the circuits by applying the "unworkable" doctrine which it has already rejected? The only logical and workable approach to determining pre-*Garcia* law is to use the objective evidence of pre-*Garcia* law, the text of the FLSA and its attendant DOL regulations, neither of which were ever held inapplicable to mass transit by a final court decision or act of Congress. On the contrary, their enforceability was clearly upheld by the Court in *Garcia* and as applied to mass transit by Congress in enacting the 1985 FLSA Amendments, §§ 2(c), 7.

In enacting the 1985 FLSA Amendments, Congress considered various legislative proposals for relieving em-

ployers of liability for FLSA violations occurring both before and after the *Garcia* decision. *See supra* discussion Section IC. Congress chose to use the DOL's existing regulations as the only objective basis for determining whether a particular governmental activity was to be statutorily exempt from liability prior to April 15, 1986. 1985 FLSA Amendments, §§ 2(c), 7.

> The crucial point . . . is that *Congress defined the scope of the exception to the liability—limiting FLSA Amendments not by using the "traditional function" rule from National League, but by using the specific list of non-traditional functions established by the special enforcement policy.* Therefore, determining whether an action against a state or locality for overtime pay under the FLSA is precluded by the FLSA Amendments does not require analysis of the particular function under *National League.* The applicable rule is that only a state or local government employee who worked in one of the areas designated as nontraditional may bring an action for overtime violations which occurred before April 15, 1986.

Wong v. New York, 641 F.Supp. at 590 (emphasis added). Since mass transit was clearly designated "nontraditional" under DOL's 1979 regulations, the 1985 FLSA Amendments preserved the claims of SAMTA's employees and required that they be resolved on the basis of the applicable federal statutory scheme.

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* * * *

V. SAMTA IS STATUTORILY LIABLE FOR ITS OVERTIME VIOLATIONS UNDER PRE-*GARCIA* LAW.

The district court and SAMTA's contentions that plaintiffs have not "vigorously urged rejection of Judge Shannon's consistent position" that they performed a traditional government function and that there is "no authority" mandating rejection (R. 8; SAMTA Br. at 47, 48) is directly contradicted by the record. *Garcia* vigorously appealed both of Judge Shannon's rulings to the Supreme Court and the resulting Supreme Court rulings vacating and reversing his rulings are binding authority for their rejection. *Donovan v. SAMTA*, 457 U.S. 1102 (1982); *Garcia*, 469 U.S. 528.

Nevertheless, in the event this Court decides to rule on the basis of pre-*Garcia* law, it must reject SAMTA's attempt to have this Court apply the district court's vacated and reversed rulings. No principle of jurisprudence could possibly support the bizarre result that a rationale and ruling reversed by the Supreme Court could be resurrected and enforced by the district court on remand. Indeed, the very attempt to apply the rule in *National League* would require this Court to reverse the *Garcia* rejection of the rule "as unsound in principle and unworkable in practice." 469 U.S. at 546. Instead, this Court should adopt the only objective evidence of pre-*Garcia* law, the text of the FLSA and its attendant regulations, neither of which were ever held inapplicable to mass transit by a final court decision or Act of Congress. Congress approved such an approach in enacting the 1985 FLSA Amendments when it preserved the liability of mass transit in accordance with the pre-*Garcia* regulations. *Wong*, 641 F.Supp. at 590.

* * * *